

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDY CORDERO GUDIEL et al.,

Defendants and Appellants.

B201995

(Los Angeles County
Super. Ct. No. GA059207)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Wesley, Judge. Affirmed as modified.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant Fredy Cordero Gudiel.

Dorris M. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant Pedro Pena.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant William Torres.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sarah J. Farhat and David A. Voet, for Plaintiff and Respondent.

Fredy Gudiel, William Torres, and Pedro Pena appeal from the judgment entered after they were convicted of second degree murder for killing a rival gang member. We affirm, rejecting their contentions that the trial court committed instructional errors, insufficient evidence supported a gang allegation, and the trial court was unaware of its discretion to place Gudiel on probation. We agree that the abstract of judgment should be corrected to omit language describing Pena's offense as first degree murder, and will order that the appropriate correction be made.

FACTS AND PROCEDURAL HISTORY

As sundown approached on October 6, 2004, Fredy Gudiel, William Torres, and Pedro Pena beat rival gang member William Maldonado to death.¹ Appellants were members of the West Side Locos gang, and Maldonado belonged to the Toonerville gang. Pena and Torres and their friend Edgar Babayan had just picked up Gudiel in Torres's car in response to Gudiel's call for help because he was having trouble with taggers armed with crowbars outside his girlfriend's house in Toonerville territory. Torres was driving, Pena was in the front passenger seat, and Babayan and Gudiel sat in the back.

Shortly after Gudiel was picked up, Torres drove past Maldonado, who was riding his bike in the opposite direction. Maldonado had a shaved head and wore the baggy style clothes associated with gang members. Torres made a u-turn and pulled alongside Maldonado. According to Babayan, either Torres or Pena asked Maldonado where he

¹ We will sometimes refer to Gudiel, Torres, and Pena collectively as appellants.

was from, a question that was intended to determine Maldonado's gang affiliation. Maldonado said he was from Toonerville and stopped his bike. He appeared to reach for something in his backpack as soon as he was asked where he was from, and appellants – but not Babayan – got out of the car. Torres beat Maldonado with a miniature souvenir baseball bat he had in the car. Either Gudiel or Pena used an aluminum bat to beat Maldonado. Maldonado did not have a weapon in his hands and did not fight back.² As Maldonado lay on the ground, someone picked up his bike and threw it on him. He was bleeding heavily. Babayan shouted at appellants to stop. The beating lasted 15 to 20 seconds, after which appellants and Babayan drove off.

Maldonado was able to walk to his sister's house. She saw that he was seriously injured and drove him to a hospital emergency room. He died four days later from blunt trauma brain injuries. An autopsy showed that he had three head injuries, including two skull fractures. There were marks elsewhere on his body consistent with being punched, kicked, or struck with some object.

Glendale police officers who were called to the scene of the incident after it happened found Maldonado's bike and pieces of a baseball bat that were covered with blood. The letters WSL-13 and the word Crow were carved into the bat. Crow was Gudiel's gang moniker. The letters TVR, indicating Toonerville, were written on the seat post of Maldonado's bike.

Glendale police detective Keith Soboleski interviewed appellants separately. Gudiel confirmed that he was a member of the West Side Locos and that he got a ride from Pena and Torres after being harassed by people near his girlfriend's house. He said appellants attacked Maldonado after he identified himself as a Toonerville member, and that he considered Maldonado his enemy because of that fact. Gudiel denied hitting Maldonado with a bat. Gudiel said he kicked and punched Maldonado, then threw the bike on him out of instinct. Maldonado was on the ground, screaming from pain, and had

² No weapon was ever found in Maldonado's backpack. However, a folding knife was later found in his pants pocket.

blood all over him. Gudiel explained that this incident was an expected part of the gang life he had long ago chosen.

Torres at first denied being involved in the incident. Eventually he admitted taking part, but said appellants had not asked Maldonado where he was from. Instead, Maldonado spontaneously shouted out “Toonerville” and made a Toonerville hand sign as appellants drove by him. Torres stopped his car so he could confront Maldonado. When Maldonado was on the ground, Torres hit him on top of the head with the miniature bat, which then broke into several pieces. Torres said he grabbed two of the bat shards, got back in the car, and drove off. He later washed those shards with hydrogen peroxide and threw the peroxide bottle into a storm run-off wash. Torres said he had recently resumed using drugs and alcohol because his girlfriend, who was the mother of his child, had kicked him out of their house.

Pena also initially denied, then admitted, being involved in the attack. He claimed Maldonado started it because Maldonado was glaring at him. When Maldonado was challenged, Maldonado yelled out “Toonerville” and reached for his backpack. Pena believed Maldonado was “going to pull something out, so I’m a, you know my life too.” Pena said he was the first to exit Torres’s car, and admitted using an aluminum bat that was “[n]ot that big” to beat Maldonado. Pena said Maldonado fought back and that the incident was like mutual combat. He agreed that the incident escalated and got out of hand. He did not think the bat “would have messed him up” and felt bad about what had happened.

Steward Brackin, a Glendale police sergeant, testified as an expert on gangs, including the West Side Locos. Toonerville and West Side Locos were longtime rivals. Appellants were known to him and other officers as members of West Side Locos. The question “where you from?” was a form of challenge typically used by gang members. Denying one’s own gang membership was extremely disgraceful and gang members would not ordinarily back down from such a challenge. Maldonado was attacked in Toonerville territory. Graffiti bearing his gang moniker at a park in Toonerville territory

had been crossed out and replaced with Gudiel's and Pena's gang monikers. Such conduct was considered a challenge to their gang rivals.

Using the facts of this case as a hypothetical springboard, Brackin believed the attack was committed for the benefit of the attackers' gang. According to Brackin, a successful violent response to a rival gang challenge "increases your standing. It increases your standing not only with the rival gang, but also with other gangs because the word gets out, and also amongst just the regular citizenry." Brackin also testified that an individual gang member's status increased along with his use of violence, and that a gang's general status rose along with the amount of violence by its members.

Appellants were charged with first degree murder, along with an allegation that they were active gang members who committed the crime for the benefit of, or in association with, their street gang. (Pen. Code, § 186.22, subd. (b)(1)(C).) At trial, appellants contended they acted out of an unreasonable belief in the need for self-defense and were therefore guilty of no more than voluntary or involuntary manslaughter. A jury convicted appellants of second degree murder, and found the gang allegation true as to all three. Probation was denied as to each appellant. Torres and Gudiel were given sentences of 15 years to life, and Pena was sentenced to 30 years to life.

Appellants contend: (1) the trial court erred by instructing the jury with CALJIC No. 2.70 that it should view with caution evidence of out-of-court statements by appellants that might be construed as confessions or admissions; (2) the gang benefit allegation must be reversed because there was insufficient evidence that their crime was committed for the benefit of the West Side Locos gang; and (3) the trial court erred by not defining assault in conjunction with jury instruction CALJIC No. 5.54 concerning self-defense by an initial aggressor. Pena and Torres contend the trial court erred by not instructing the jury that Gudiel's statement to the police could not be used as evidence against them. Gudiel contends remand for resentencing is required because the trial court relied on a probation report that incorrectly stated he was ineligible for probation. Pena contends the abstract of judgment must be corrected because it describes his second

degree murder conviction as being for second degree willful, deliberate, and premeditated murder, terms which apply to only first degree murder.

DISCUSSION

1. *Giving CALJIC No. 2.70 Was Not Error, and In Any Event, Was Harmless*

The trial court instructed the jury with CALJIC No. 2.70, which defines admissions and confessions, tells the jury it is the exclusive judges as to whether a defendant made a statement that amounts to a confession or admission and whether it was in fact true, and that it was to view with caution evidence of oral confessions and admissions not made in court. When there is evidence of statements by a defendant that could be construed as an admission or confession, the trial court has a sua sponte duty to give this instruction. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346.)

Appellants objected to this instruction, but did not explain why. They contend that even though the instruction is for their benefit, they had a right to waive it and that the trial court erred by overruling their objection. According to appellants, their trial counsel might have made the tactical decision to forego the instruction because there was little doubt as to the accuracy and authenticity of their recorded statements to the police and the instruction might have drawn unnecessary attention to those statements by encouraging the jury to conclude they were in fact confessions or admissions.

The decisions appellants rely on to support their right to waive CALJIC No. 2.70 are inapposite and inapplicable. The court in *People v. Maury* (2003) 30 Cal.4th 342, 394 rejected a claim of ineffective assistance of counsel based on defense counsel's failure to request a limiting instruction on cross-admissible evidence in a trial of multiple crimes. Because the trial court had no sua sponte duty to give that instruction, and because counsel might have had a tactical reason to reject the instruction, the court held that no ineffective assistance of counsel occurred. The court in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053 rejected a similar ineffective assistance of counsel claim based on the failure to request a limiting instruction on the use of gang evidence.

Citing to *Maury* and other decisions, the court held there might have been a tactical reason for not requesting the instruction and again noted that the trial court had no sua sponte duty to give the limiting instruction. The court in *People v. Towey* (2001) 92 Cal.App.4th 880, held that a defendant's trial counsel has the power to waive jury instructions that tell the jury not to draw adverse inferences from the defendant's failure to testify, and that the defendant may rely on the state of the prosecution's evidence. No personal waiver from the defendant was necessary, the court held, because it was a tactical decision for trial counsel. The *Towey* court also noted that the trial court had no sua sponte duty to give those particular instructions. (*Id.*, at p. 884.)

Apart from the obvious factual dissimilarities – none of the decisions cited by appellants concerns CALJIC No. 2.70 – there is a critical legal dissimilarity. In all three of those decisions, the appellate courts noted that the trial court had no sua sponte duty to give the disputed instruction. As mentioned above, that duty exists for CALJIC No. 2.70. (*People v. Marks, supra*, 45 Cal.3d at p. 1346.) Accordingly, we hold that no error occurred.

Assuming for discussion's sake only that error occurred, we alternatively conclude it was harmless. Because appellants do not contend that their constitutional rights were violated by the court's decision to give the instruction, we will reverse only if it is reasonably probable they would have achieved a more favorable result without that instruction. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471-1472.) Appellants contend the instruction was prejudicial because it led the jury to focus on their statements to the police and conclude they were in fact confessions or admissions, when, according to appellants, their statements in fact bolstered their claim that they acted in imperfect self-defense and should therefore be convicted of only manslaughter.

This contention fails in two ways. First, the argument shows why the instruction was in fact helpful, because it directed the jury to determine whether the statements were in fact confessions or admissions, and to view those statements with caution. With or without the instruction, appellants' statements were admissions that they at least engaged in the charged acts, even if their mental states remained in issue. Second, the jury was

instructed on the lesser included offenses of voluntary and involuntary manslaughter, and was therefore free to consider the meaning and effect of appellants' statements in regard to those lesser offenses. The jury obviously rejected the notion of imperfect self-defense, and therefore a different result was not reasonably probable.

2. *The Gang Allegation Was Supported By Substantial Evidence*

Penal Code section 186.22, subdivision (b)(1) provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" The jury found true the allegation that appellants' crime fell within this section. Appellants contend there is insufficient evidence they acted for the benefit of West Side Locos. Their contention rests on the testimony of gang expert Brackin. Asked if he had an opinion whether the attack on Maldonado was for the benefit of West Side Locos, Brackin said yes. Asked what his opinion was, Brackin said, "That it would be done for the benefit of a rival street gang."³ Asked how that crime would benefit a street gang, Brackin replied, "There is – there is a term that they use, it's called being punked or being pushed around. If you challenge somebody and you meet that challenge with violence and you come out victorious, then it increases your standing. It increases your standing not only with that rival gang, but also with other gangs because the word gets out, and also amongst just the regular citizenry." Asked if it was accurate to say that "the more violent you are, the greater status you have within your gang?" Brackin answered "yes." Asked if it was "accurate to say that the more violent your gang is, the more status you have within the gang community?" Brackin again answered "yes."

³ Appellants point out the apparent nonsequitur in Brackin's statement that the crime would benefit a *rival* street gang, which was followed in the reporter's transcript with the designation *sic*. Although they claim the use of the term *sic* was improper, they concede for purposes of their argument that Brackin in fact said, or meant to say, that the crime was committed for the benefit of West Side Locos.

Appellants ask us to read this entire exchange as relating to the benefits and status of individual gang members, not to a gang as a whole. In short, appellants contend, Brackin did no more than opine that these crimes were committed by appellants to benefit only themselves and to increase their own standing within their own gang and with rival gangs. We reject this cribbed interpretation of Brackin's testimony. Although the last two questions from the above-quoted colloquy appear aimed at the benefit to individual gang members, the first two questions must be read in light of the immediately preceding questions concerning whether the crimes were intended to benefit the gang. Viewed in that context, his response that if "you" emerged victorious from a violent response to a rival gang challenge, it would increase "your" standing with the rival gang and other gangs can be read as a reference to the gang as a whole. Under the well-known rules relating to the analysis of substantial evidence, we conclude that Brackin's testimony was sufficient for the jury to conclude that appellants' crimes were committed for the benefit of their gang.

We alternatively conclude that there was sufficient evidence of one of the alternate prongs of section 186.22, subdivision (b)(1) – that the crime be committed in association with a criminal street gang. The fact that appellants, all members of the same gang, acted in concert in attacking a rival gang member in the rival's own territory supports an inference that appellants committed their crime in association with a criminal street gang. (*People v. Leon* (2008) 161 Cal.App.4th 149, 163.)

3. *The Trial Court's Failure to Define "Assault" Was Not Instructional Error*

Perfect self-defense is a complete defense to a homicide charge because the killing was justifiable. It applies when the defendant actually and reasonably believed in the need to defend himself from imminent danger of death or great bodily injury. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1199, fn. 12.) The doctrine of imperfect self-defense applies when the defendant kills with the actual but unreasonable belief in the need to defend himself, and reduces the crime to voluntary manslaughter. (*Ibid.*) Appellants did not argue to the jury that they were innocent under the doctrine of perfect

self-defense. Instead, they contended they were guilty of at most voluntary manslaughter under the imperfect self-defense doctrine, and perhaps involuntary manslaughter. The jury was instructed to consider first and second degree murder, voluntary manslaughter, and involuntary manslaughter.⁴

At appellants' request, the court instructed the jury with CALJIC No. 5.17 concerning their imperfect self-defense theory based on their actual but unreasonable belief that Maldonado was about to attack them when he reached for something in his backpack. Even though appellants did not argue that they were innocent under the doctrine of perfect self-defense, at their request the court also gave several instructions concerning that defense. These included: CALJIC No. 5.30, which defined self-defense and said a killing done in self-defense was lawful; and CALJIC No. 5.51, which said that actual danger was not required to justify self-defense so long as there was an actual, reasonable belief in the need for self-defense. At the prosecutor's request, the court supplemented these with other perfect self-defense instructions: CALJIC No. 5.52 that the right of self-defense ends when the real or apparent threatened danger stops; CALJIC No. 5.53 that the right of self-defense ends when the attacker is disabled and apparently unable to pose a further threat; CALJIC No. 5.54 that the right of self-defense is only available to someone who "initiated an assault" if that person has tried in good faith to stop the fight and has made the other person aware of that fact, and the opponent continues to fight; and CALJIC No. 5.55 that a plea of self-defense is not available to someone who seeks a quarrel in order to create a real or apparent necessity of acting in self-defense. The court also gave CALJIC No. 5.50, which states that a person threatened with an attack that justifies the use of self-defense need not retreat and may stand his ground and defend himself, but the record does not show who requested that instruction.

Appellants objected to only CALJIC No. 5.54, but did not explain why. They contend on appeal that the trial court erred in giving this instruction without also

⁴ Involuntary manslaughter applies when the defendant kills through criminal negligence by committing an act that involves a high degree of risk of death or great bodily injury. (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 378.)

instructing the jury on the definition of “assault.” According to appellants, this allowed the jury to mistakenly determine that their initial challenge to Maldonado by asking where he was from qualified them as initial aggressors because there was no evidence that Maldonado fought back. As a result, they contend, their defense of self-defense “evaporated.”

To the extent we are able to comprehend this confusing argument, we find it somewhat puzzling, given that appellants never claimed perfect self-defense when arguing to the jury.⁵ As a result, the perfect self-defense instructions were inapplicable. The jury was instructed with CALJIC No. 17.31 that not all the instructions were necessarily applicable, and that it should disregard any it found inapplicable. Given the defense arguments, which never mentioned perfect self-defense, we presume the jury applied CALJIC No. 17.31 and disregarded all of the perfect self-defense instructions as inapplicable. As a result, any error in failing to define the term “assault” in CALJIC No. 5.54 had no effect on the outcome, and was therefore harmless. (*People v. Hesslink* (1985) 167 Cal.App.3d 781, 792.)

We alternatively conclude that the issue was waived because appellants failed to request an instruction defining assault. (*People v. Hart* (1999) 20 Cal.4th 546, 622.)

4. *Pena and Torres Waived a Limiting Instruction on Gudiel’s Statement*

In addition to hearing portions of Gudiel’s statement to the police describing the attack on Maldonado, the jury also heard Gudiel discussing with his police interviewers his belief that killing a rival gang member was an inevitable facet of gang life that he

⁵ Torres argued that there was no evidence he intended to kill, but admitted he committed a crime and asked the jury to find him guilty of no more than voluntary or involuntary manslaughter. Gudiel also admitted he was guilty of something, but contended his crime was voluntary manslaughter under the imperfect self-defense doctrine. Pena’s counsel ended his argument by saying he was “not asking you to find [him] not guilty. I’m not asking you to hold him unaccountable for what happened”

long ago accepted.⁶ The prosecutor made several references to this evidence during his closing argument.⁷ Torres and Pena did not request, and therefore the trial court did not give, a limiting instruction telling the jury not to consider those statements as evidence against them. They contend the trial court erred because it had a sua sponte duty to give such an instruction. We disagree.

Under Evidence Code section 355, a limiting instruction must be requested. If not, it is deemed waived as an appellate issue. (*People v. Boyer* (2006) 38 Cal.4th 412, 465.) Pena and Torres contend they fall within an exception to this general rule that was established in *People v. Collie* (1981) 30 Cal.3d 43. The defendant in *Collie* was convicted of the attempted first degree murder of his estranged wife. On appeal, he contended the trial court had a sua sponte duty to give a limiting instruction on the proper uses of evidence of his past attacks on his wife. The court held that there might be “an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel’s inadvertence.” Because that was not the case there, the *Collie* court held no error occurred. (*Id.*, at pp. 63-64.)

⁶ These included statements by Gudiel that: if he had been moving down the street like Maldonado, they would have done the same to him; that he “knew very damn well what I was getting into when I got jumped in”; that he prepared himself for the fact that he might someday have to kill a rival gang member; and, that he did not accept it and knew it was stupid and wrong, but he knew that was the way things worked.

⁷ In discussing whether the killing was intentional, the prosecutor referred to Gudiel’s statement that “he knew from the time he got into the gang and what he’s prepared to do.” He referred to it again when he said that Gudiel, “at least of the three [defendants], told you in that videotape and the audiotape that I played for you today, exactly what was in his mind. When we see a rival gang member, we want to kill them.” Without mentioning Gudiel’s statement, he also said that it was part of the gang culture to conclude that when you saw a rival gang member, you want to kill him.

We hold that *Collie's* exception is inapplicable here. The disputed portions of Gudiel's statement were not a dominant part of the prosecution's case. Instead, its case rested primarily on the eyewitness testimony of Babayan and, as to Torres and Pena, their own statements to the police. Furthermore, Gudiel's statement was more than minimally relevant to a legitimate purpose at trial. Rather, it went to his state of mind, and to the issue of whether the killing was committed for the benefit of the West Side Locos.

5. *Remand For Resentencing Is Not Required*

The trial court imposed on Gudiel the mandatory sentence of 15 years to life for second degree murder, and denied him probation. Gudiel contends that an error in the probation report caused the trial court to incorrectly assume it had no discretion to grant him probation, and asks that we reverse his sentence and remand for resentencing. In order to address this contention, we set forth the facts arising from the sentencing hearing.

Before sentencing Gudiel, the court received sentencing memoranda from the prosecutor and defense counsel, as well as a probation report. The prosecutor's sentencing memorandum said that "[p]ursuant to Penal Code section 1203.0(e) [*sic*] probation shall not be granted upon a conviction of murder unless it is an unusual case where the interests of justice would best be served if the person is granted probation." It also noted that the required sentence was 15 years to life. Defense counsel's sentencing memorandum agreed that the sentence of 15 years to life was required, but said nothing about probation. The probation report said Gudiel was ineligible for probation pursuant to "section 190.2(A)(15) Penal Code and 186.22(B)(4) Penal Code."⁸

⁸ There is no Penal Code section 1203.0(e). Nor is there a Penal Code section 190.2(A)(15). Penal Code section 190.2, subdivision (a)(15) states that a defendant convicted of first degree murder by means of lying in wait is ineligible for probation, but appellants were convicted of second degree murder and this was not a case of lying in wait. Penal Code section 186.22, subdivision (b)(4)(A)-(B) specifies the punishment for those convicted of certain offenses along with a gang benefit allegation, but says nothing about probation. Penal Code section 186.22, subdivision (c) provides that if the court

Although both documents were referred to at the hearing, the topic of probation was never mentioned. The first page of the minute order from the sentencing hearing states that probation was denied. On the second page, the order also stated that the probation report had been read and considered.

As Gudiel correctly notes, the probation report was wrong because the Penal Code section 190.2 probation bar applies only to first degree murder, and because nothing in the gang benefit enhancement statute requires denying probation when gang related crimes are committed. According to Gudiel, the transcript from the sentencing hearing shows both the trial court and defense counsel were misled by the probation report, and used the probation report as the basis for deeming him ineligible for probation. Gudiel relies on the following colloquy between the court, prosecutor Bean, and defense counsel Holt:

“The court: Any legal cause why sentence should not be pronounced?

Mr. Holt: No, it isn’t.

The court: I’ve read and considered a probation report dated May 19th, 2006.

Does counsel wish to be heard with respect to that?

Mr. Holt: No.

The court: People?

Mr. Bean: Your Honor, I don’t think the court has discretion on the sentence, but I wish the court did.

What [appellants] did, did not just affect them. As they sit in prison, I hope they realize it affected the family of Mr. Maldonado, his nephews, his sister, his parents, and it affected Mr. Gudiel’s parents and family as well.

grants probation for a defendant who was found to have committed a crime for the benefit of a street gang, then the defendant must serve at least 180 days in county jail. Therefore, Penal Code section 186.22 in fact contemplates the availability of probation as a sentencing option. It would be helpful to the trial courts and this court if those who prepare probation reports and sentencing memoranda took care to correctly cite any statutes they deem applicable to their recommendations.

It's a horrible cowardly crime that hopefully he'll think about. Hopefully somebody learns from it, but I just ask the court to impose the sentence that the law requires.

The court: And do you stipulate that the probation report can be received as a sentencing report in this case?

Mr. Bean: Yes, your Honor.

Mr. Holt: Yes, your Honor.

The court: Mr. Holt, do you want to be heard any further other than what you put in your sentencing memorandum?

Mr. Holt: No, I think the court has no discretion in this matter, it's a mandatory sentence.

The court: I agree, I don't have any discretion, but I think your comments in your sentencing memorandum [are] worth repeating. Mr. Gudiel, it's such a waste for you and your fellow defendants in this case."

According to Gudiel, this exchange shows the trial court must have mistakenly believed he was ineligible for probation based on the erroneous probation report. His counsel's failure to object or argue in favor of probation was ineffective assistance of counsel, he contends. Gudiel reads far too much into this colloquy, however, which we believe says no such thing. As noted above, at no point during the hearing was the topic of probation mentioned. As we read the transcript, the references by the court and counsel to the absence of discretion concerned the length of the sentence itself – 15 years to life – which was mandated by law. (Pen. Code, § 190, subd. (a).) For instance, the prosecutor began his remarks by reminding the court it had no discretion, but he wished it did due to the horrible nature of the crime. The prosecutor could not have been wishing for discretion to grant probation, and must have been expressing a desire for discretion to impose an even greater sentence than the law required. Defense counsel's statement that the court had no discretion because "it's a mandatory sentence" must be viewed in this light. This is made clear by the court's later comment when actually announcing its sentence of 15 years to life, noting that "it's not discretionary." Furthermore, the

prosecution's sentencing report indicated that probation could be granted in the interests of justice if the court found this was an unusual case.

In short, nothing said at the hearing shows that the trial court denied probation to Gudiel based on some mistaken notion that he was ineligible to receive it. Respondent essentially contends the foregoing is academic because Gudiel was ineligible for probation because he was armed with a deadly weapon (Pen. Code, § 1203, subd. (e)(1)), used a deadly weapon (Pen. Code, § 1203, subd. (e)(2)), and willfully inflicted great bodily injury on Maldonado (Pen. Code, § 1203, subd. (e)(3)). Gudiel contends we may not affirm as to the first two because he did not strike Maldonado with a bat, as did Pena and Torres, and that his fists and feet, and the bicycle he tossed on Maldonado, were not deadly weapons as a matter of law, requiring a trial court finding that under the circumstances those were deadly weapons. As to the third, Gudiel contends that he did not strike the blows that produced the fatal head wounds, and without a finding by the trial court that the blows he struck inflicted great bodily injury, we may not affirm on that basis.

We need not resolve these issues, however, because respondent raises an alternate ground for affirmance: assuming that the trial court in fact had discretion to grant probation to Gudiel, as he contends on appeal, the record shows it was not reasonably probable the court would have done so. (*People v. Gutierrez* (1987) 195 Cal.App.3d 881, 884-885.)

Gudiel contends that probation was likely if the trial court had been clued in to consider his scant criminal record of just one juvenile adjudication and the fact that he did not wield a baseball bat and did not inflict the fatal blows. We disagree. At the sentencing hearing, the court told Gudiel: "This whole gang culture that you got yourself involved in, I mean you chose it, so I don't have a whole lot of sympathy for you. You chose to live this type of a life and you didn't have to. [¶] There are people from your neighborhood, with the same upbringing that don't choose the gang lifestyle, so you chose it. And the act that you did, I think Mr. Bean described it appropriately, it's a cowardly act. [¶] I can understand one on one fights between people, they happen. But

this type of an attack is just not justifiable, it doesn't make any sense. So the jury found you guilty of murder in the second degree, and they also found the gang allegation to be true." Given these comments, and the despicable nature of the crime itself, we conclude it was not reasonably probable the trial court would have granted probation to Gudiel despite the few mitigating factors in his favor.

6. *The Abstract of Judgment Must Be Corrected*

Even though Pena was convicted of second degree murder, his abstract of judgment states he was convicted of "SECOND DEGREE WILLFUL, DELIBERATE, PREMEDITATED MURDER." As Pena contends and respondent concedes, these three adjectives apply only to first degree murder, and should be eliminated. Therefore, we will order that Pena's abstract of judgment be modified to delete those terms.

DISPOSITION

We remand this matter to the clerk of the superior court with directions to amend Pena's abstract of judgment only by deleting the terms willful, deliberate, and premeditated from the language describing his offense as second degree murder. The clerk is directed to prepare a modified abstract in accordance with our directions and send a corrected copy to the Department of Corrections. In all other respects, the judgments against Pena, Torres, and Gudiel are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.